IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 20, 2008

STATE OF TENNESSEE v. BOBBY R. BAGGETT

Appeal from the Circuit Court for Dickson County
No. CR8602 George Sexton, Judge

No. M2007-00985-CCA-R9-CO - Filed July 2, 2008

The Appellant, Bobby R. Baggett, by means of a Rule 9 interlocutory appeal, seeks review of the Dickson County Circuit Court's ruling that the assistant district attorney general did not abuse her discretion in denying his application for pretrial diversion. Following review of the record, we conclude that the relevant factors were properly considered by the assistant district attorney general and that no abuse of discretion occurred. Accordingly, we affirm the trial court's denial of Baggett's application for diversion.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

DAVID G. HAYES, SR. J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and NORMA MCGEE OGLE, JJ., joined.

Gary J. Hodges, Clarksville, Tennessee, for the Appellant, Bobby R. Baggett.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Dan M. Alsobrooks, District Attorney General; and Lisa C. Donegan, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Procedural History

On June 20, 2006, a Dickson County grand jury returned an indictment charging the Appellant with two counts of Class E felony sexual battery of his fourteen-year-old nephew. On March 4, 2007, the Appellant applied for pretrial diversion pursuant to Tennessee Code Annotated section 40-15-105. On March 5, 2007, the State denied the Appellant's request by letter. The following day, the Appellant presented a second request for diversion and included numerous supporting letters from colleagues and friends. On March 7, 2007, the State again denied the Appellant's request. Accordingly, the Appellant filed a petition for writ of certiorari with the trial court. On March 16, 2007, a hearing was held, after which the trial court denied the Appellant's

petition finding "sufficient grounds to deny" pretrial diversion. On May 10, 2007, an order was entered affirming that denial. The court subsequently granted the Appellant permission to pursue a Rule 9 interlocutory appeal to this court.

Analysis

A defendant is statutorily eligible for pretrial diversion if the defendant has not previously been granted diversion, does not have a disqualifying prior conviction, and is seeking pretrial diversion for an offense that is not a Class A or Class B felony, certain Class C Felonies, a sexual offense, driving under the influence, or vehicular assault. T.C.A. § 40-15-105(a)(1)(B)(i) (2003); *State v. McKim*, 215 S.W.3d 781, 786 (Tenn. 2007); *State v. Bell*, 69 S.W.3d 171, 176 (Tenn. 2002). Nonetheless, statutory eligibility for pretrial diversion does not entitle a defendant to diversion. *State v. Curry*, 988 S.W.2d 153, 157 (Tenn. 1999). Rather, the district attorney general has the sole discretion to determine whether to grant pretrial diversion to one who meets the strict statutory requirements. *Id*. at 176 (citing *Curry*, 988 S.W.2d at 157). In determining whether to grant pretrial diversion, the district attorney general "has a duty to exercise his or her discretion by focusing on a defendant's amenability for correction and by considering all of the relevant factors, including evidence that is favorable to a defendant." *Bell*, 69 S.W.3d at 178; *see also State v. Hammersley*, 650 S.W.2d 352, 355 (Tenn. 1983). Any factors tending to reflect accurately upon whether the applying defendant will or will not become a repeat offender should be considered. *Hammersley*, 650 S.W.2d at 355. Our supreme court has held that

> [a]mong the factors to be considered in addition to the circumstances of the offense are the defendant's criminal record, social history, the physical and mental condition of the defendant where appropriate, and the likelihood that pretrial diversion will serve the ends of justice and the best interests of both the public and the defendant.

Id. Furthermore, the prosecutor may consider the need for general deterrence. *McKim*, 215 S.W.3d at 787 (citing *State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993)). However, the circumstances of the offense and the need for deterrence "cannot be given controlling weight unless they are 'of such overwhelming significance' that they [necessarily] outweigh all other factors." *Id*. (quoting *State v. Markham*, 755 S.W.2d 850, 853 (Tenn. Crim. App. 1988)). Our supreme court has recognized that "the responsibility placed upon prosecutors to pick and choose among the lot [of applicants for pretrial diversion] based upon a particular candidate's amenability to rehabilitation and recidivism requires the exercise of unusual powers of discrimination." *Hammersley*, 650 S.W.2d at 353.

If a prosecutor denies pretrial diversion, the denial must be written and must articulate the factors considered, as well as the weight attributed to each factor. *Curry*, 988 S.W.2d at 157. "This requirement entails more than an abstract statement in the record that the district attorney general has considered [all relevant] factors." *McKim*, 215 S.W.3d at 787 (quoting *State v. Herron*, 767 S.W.2d 151, 156 (Tenn. 1989)). A district attorney general's failure to consider and articulate all

relevant factors constitutes an abuse of discretion. *Bell*, 69 S.W.3d at 178. Additionally, a district attorney general must avoid relying upon irrelevant factors when denying diversion. *Id.*

In the event pretrial diversion is denied, a defendant may appeal by filing a petition for a writ of certiorari in the trial court. T.C.A. § 40-15-105(b)(3). The prosecutor's decision is "presumptively correct," *Curry*, 988 S.W.2d at 158, and, on review, the trial court is limited to examining only the evidence considered by the district attorney general and must determine whether the prosecutor has abused his or her discretion, *Bell*, 69 S.W.3d at 177. That is, "the trial court should examine each relevant factor in the pretrial diversion process to determine whether the district attorney general has considered that factor and whether the district attorney general's finding with respect to that factor is supported by substantial evidence." *State v. Yancey*, 69 S.W.3d 553, 559 (Tenn. 2002). The trial court must focus on the trial court's methodology rather than the intrinsic correctness of his or her decision, and the trial court should therefore not engage in re-weighing the evidence considered by the district attorney general. *McKim*, 215 S.W.3d at 788 (citing *Yancey*, 69 S.W.2d at 559). If the trial court determines that the district attorney general has failed to consider and weigh all relevant factors, the trial court must reverse the district attorney general's decision and remand the matter for further consideration and weighing of all of the factors relevant to the pretrial diversion determination. *Id*. (citing *Bell*, 69 S.W.2d at 180). On appeal, this court must determine whether the trial court's decision is supported by a preponderance of the evidence. *Curry*, 988 S.W.2d at 158.

In the instant case, the assistant district attorney general provided two written responses denying the Appellant pretrial diversion. In both letters, the assistant district attorney general specifically stated that she was of the opinion that the Appellant was ineligible for diversion. The prosecutor explained that, although the crimes for which the Appellant was indicted were not disqualifying crimes, the crimes which he actually committed, as reflected by the facts, were those of sexual battery by an authority figure, which is a disqualifying offense for diversion purposes. *See* T.C.A. § 40-35-313(k) (2006). Nonetheless, the prosecutor concluded that, even assuming that the Appellant was statutorily eligible, he was not a proper candidate for diversion. In the March 5, 2007 letter, the prosecutor stated:

> . . . As to the third basis set forth in your letter, i.e., that [the Appellant] has no mental health issues whatsoever, I have absolutely no proof of that other than a blanket assertion. Additionally, I feel that individuals involved in sexual acts against children do certainly have some mental health issues, regardless of how the DSM-IV might categorize them. Consequently, I would give no weight to your third basis in support of diversion. [The Appellant's] involvement in the teaching profession is something I view as a double-edged sword. I totally admire and respect those in the teaching profession; however, the interests of justice require that those children be protected from those with known pedophilic, pederastic or hebephilic tendencies. Your client's behavior toward the victim herein certainly falls into at least one of those categories. While [the Appellant's] education, work history, marital status and church attendance are all admirable, those factors are far outweighed by the interests

> of justice. [The Appellant] is a teacher. He abused a position of trust with his own nephew. As a teacher, he is placed in the ultimate position of trust in that he is daily granted a captive audience by a law which requires mandatory school attendance. . . . As a prosecutor, I believe I too hold a position of public trust and will not willingly or knowingly violate that trust by sending children forcibly into the hands of man, paid by our tax dollars, whom I believe the evidence reveals to be a child molester.
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> Additionally, diversion in this case would depreciate the seriousness of the offense.

In the March 7, 2007 letter of denial, the prosecutor further noted:

> And, as I said in my last letter, assuming he is "statutorily eligible", there are many other reasons for which to deny his request for diversion. He abused a position of family trust. He has not shown any amenability to correction. The evidence in this case shows your client to have had sexual contact, frankly on many more occasions than those for which he was charged, with a fourteen year old boy. In his statement to law enforcement, while lauding the truthfulness of the victim one moment, he denied ever touching the boy's genitalia, stating he merely rubbed his stomach. Essentially he called the victim a liar and denies he had a problem. My understanding of child molestation is that there is no such thing as rehabilitation for the problem; however all of the counseling programs for child molesters will not even enroll a perpetrator unless he has admitted his predilection for sexual contact with children. [The Appellant] is by profession a teacher. I reiterate the importance of protecting society by denying [the Appellant's] request for diversion. I give overwhelming weight to the following factors: that he has violated a position of trust, that he is not, based upon the circumstances of this case and my understanding of the nature of pedolphilia, pederasty and hebephilia, a good candidate for rehabilitation; that [the Appellant] has not been honest with authorities during the scope of this investigation; that the interests of justice require that society be protected from individuals such as [the Appellant], particularly those most vulnerable, i.e., children.
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> I have considered the glowing letters regarding [the Appellant] and appreciate them and believe them to be heartfelt. They are, however, given very marginal weight given the fact that the very nature of the acts committed by [the Appellant] are rarely known or suspected by their closest admirers. . . .

On appeal, the Appellant argues that the trial court erred in determining that the assistant district attorney general did not abuse her discretion in denying pretrial diversion. The Appellant asserts that the prosecutor, in denying diversion, considered some but not all of the required factors. Specifically, he contends that she failed to consider the Appellant's eligibility criteria, circumstances of the offense, factual discrepancies to the extent of whether the Appellant admitted or denied the incident, criminal history, social history, work history, mental condition, serving the ends of justice,

and the best interest of the public and the Appellant. However, a reading of the Appellant's argument seems to acknowledge consideration of some of these factors and instead asserts the prosecutor considered irrelevant facts in the decision making process. For example, with regard to the circumstances of the offense, the Appellant argues that the prosecutor "deliberately attempted to make it look as if the [Appellant] was a danger to the children at school" where he taught based upon his criminal actions. Moreover, he argues that the prosecutor improperly focused on the Appellant's refusal to admit that he had committed the crimes when the caselaw is clear that admission to the offense is not required and cannot be a consideration. *See Lane*, 56 S.W.3d at 29. Finally, he contends that the prosecutor appears to give controlling weight to the circumstances of the offense when they were not of such overwhelming significance as to outweigh all other factors. *See Curry*, 988 S.W.2d at 158.

The State contends, however, that the assistant district attorney general considered all the requisite factors in making her decision to deny diversion. We agree. With regard to the eligibility criteria, we note that those are not required factors for consideration of diversion but, rather, are a threshold inquiry to determine whether to even consider the required factors. Thus, although the prosecutor was incorrect in her assessment that the Appellant was not eligible, the error was not fatal as the record clearly demonstrates that the prosecutor proceeded in her assessment of entitlement to diversion, assuming he was eligible. However, we would note that for eligibility requirements, the crime to be considered is the crime for which a defendant is being prosecuted, as concluded by the trial court.

Review of the record indicates that, despite the Appellant's assertions, several of the factors which he claims were omitted from consideration are specifically referenced in the prosecutor's letters of denial. As noted by the State, the assistant district attorney general discussed the Appellant's favorable social history, his lack of a criminal record, his educational background, his work history, and his marital stability, as well as acknowledging the numerous letters received on behalf of the Appellant. Moreover, the prosecutor clearly references the Appellant's mental health status and notes that no proof, other than the Appellant's blanket assertion, was presented. Likewise, there is no proof in the record before us of the Appellant's physical health. Additionally, review reveals that the prosecutor clearly considered the circumstances of the offense and the Appellant's abuse of a position of trust in committing acts against a fourteen-year old family member. Finally, the record established that the Appellant's amenability to correction was considered. While the Appellant is correct that the prosecutor cannot base a decision to deny diversion upon the fact that a defendant does not confess to the crime, that fact can be considered in the context of a defendant's amenability to correction. *See State v. Dowdy*, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994); *State v. Williams David Marks*, M2001-01497-CCA-R9-CO (Tenn. Crim. App. at Nashville, May 10, 2002). The prosecutor's focus upon the Appellant's profession as a teacher also appears to have been considered in the context of both the Appellant's amenability to correction, as well as in the interest of justice. Thus, we conclude that the prosecutor considered all the relevant factors, including those favorable to the Appellant. Moreover, the letters of denial also make reference to the weight assigned to each factor by the prosecutor as required by law. Lastly, we find nothing in the letters of denial which would indicate consideration of irrelevant factors.

In affirming the prosecutor's denial of diversion, the trial court found as follows:

> As I said earlier, I think [the Appellant] is statutorily eligible for pretrial diversion. And as you know my role as the judge is to determine whether or not the District Attorney General has abused their discretion in denying pretrial diversion.
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> While [defense counsel] is right, the law does not require a Defendant to confess before they are eligible and can be granted pretrial diversion, I think the District Attorney's office is allowed to consider that on the issue of amenability of rehabilitation. The fact that the District Attorney considered the fact that the [Appellant] abused the position of trust, that he's not amenable to rehabilitation and to avoid depreciating the seriousness of the offense, I believe, the Court believes, there is sufficient grounds to deny pretrial diversion.

According to the Appellant, the court also erred by failing to recognize that "the Assistant District Attorney General has to consider all fifteen criteria that was listed in [Appellant's] Brief in order to deny pretrial diversion, and if those criteria are not considered, then the Assistant District Attorney General has abused her discretion." As discussed supra, we have concluded that the prosecutor did in fact consider all relevant factors upon which proof was submitted. *See Bell*, 69 S.W.3d at 179. Thus, while the trial court does not specifically reference the prosecutor's consideration of the required factors, it is clear that no abuse of discretion occurred.

CONCLUSION

Based upon the foregoing, the judgment of the Dickson County Circuit Court is affirmed.

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DAVID G. HAYES, SENIOR JUDGE